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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THE DOW CHEMICAL COMPANY,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the rule stated by this Court in *Mastro Plastics v. Labor Board*, 350 U.S. 270—that a union does not waive its statutory right to strike in response to an employer unfair labor practice by agreeing to a contractual no-strike provision that does not expressly cover unfair labor practice strikes—is inapplicable when an adjudication of the unfair labor practice would implicate a question concerning the meaning of the collective agreement.

2. Whether a union's breach of a contractual no-strike provision entitles the employer unilaterally to cancel the entire collective agreement.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *Dow Chemical Co. v. National Labor Relations Board*, 636 F.2d 1352.

OPINIONS BELOW

The first decision and order of the National Labor Relations Board in this case and the decision of the Administrative Law Judge are reported at 212 NLRB 333, and are reprinted in a separately bound Appendix hereto as App. E (App. 121a-128a) and App. F (App. 129a-155a), respectively. The first decision of the court of appeals is reported at 530 F.2d 266, and is reprinted as App. D (93a-120a). The decision and order of the National Labor Relations Board on remand are reported at 102 LRRM 1199, and are reprinted as App. C (28a-

92a). The second decision of the court of appeals—the decision from which certiorari is sought—is reported at 636 F.2d 1352, and is, together with the court's judgment, reprinted as App. A (1a-25a).

JURISDICTION

The court below issued its opinion in this case on November 26, 1980, and its judgment on January 26, 1981 (App. A 25a). That court issued an order denying a timely petition for rehearing on March 26, 1981. (A copy of that order is reprinted in the separately bound Appendix as App. B (27a)). On June 12, 1981, Mr. Justice Brennan entered an order extending the time for filing this petition to and including July 24, 1981. (A copy of that order is reprinted as App. G (156a)). This Court has jurisdiction to review the judgment of the Third Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 7, 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3), 158(a)(5), and § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), are reprinted in an appendix bound together with this brief.

STATEMENT OF THE CASE

A. The Facts

Beginning in 1954, and until the events that are the subject of this case, petitioner USWA [1] had been recog-

[1] At the time of the operative facts in this case, the employees at Dow's Allyn's Point plant were represented by the International Union of District 50, Allied and Technical Workers, Local 13744. Subsequently, that international union and its locals, including Local 13744, became a part of USWA. For the sake of simplicity, we shall refer to USWA as the union involved in this case.

nized by respondent Dow Chemical Company (hereinafter "the Company") as the exclusive bargaining agent for the approximately 145 production employees at the Company's Allyn's Point, Connecticut plant. During that period, the Company and USWA entered into a series of collective-bargaining agreements covering these Allyn's Point employees. The agreement pertinent to this case was to be effective, according to its terms, from February 23, 1970, to February 26, 1973.

In the Spring of 1971, the Company, without any prior discussion with USWA, determined to carry out a basic restructuring of the method of operation in the plant's latex department. The Company decided in May, 1971, to end the continuous operation of the department and instead to run the department only five days a week. App. 131a-132a.[2] Production on each shift was to be increased by 40 percent to make up for the two lost days of operation per week. JA 45a, 66a-69a, 167a, 294a, 297a-298a.[3]

The Company's decision had a number of significant implications for the employees in the latex department. The foremost such implication was that, because of the reduction in hours worked, the elimination of overtime, weekend, and holiday premiums, and the reclassification of jobs, each of these employees would suffer a substantial diminution of earnings. The Company at the hearing of this case estimated that each employee would earn approximately $570 a year less than before. App. 132a. Employee estimates of the diminution of earnings ran considerably higher: $1500-$2000 per employee per year. JA 149a-150a.

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[2] References to the appendix to this petition, which is separately bound, shall be in the form "App. ——."

[3] References to the joint appendix in the court below shall be in the form "JA ——."

On May 21, 1971, the Company announced its decision to restructure the latex department, stating that the change was to go into effect in ten days, on May 31, 1971. App. 133a. USWA in response "took the position that the matter was subject to negotiations." App. 133a. The Company replied that it would not negotiate as to this decision. App. 133a-134a. The Company remained adamant in its insistence on that position throughout the events that were to unfold. App. 134a-135a.

In an effort to secure an opportunity to negotiate over this issue, USWA invoked the contract grievance procedure. App. 134a-135a; JA 373a. The Company rejected the grievance through the first four steps of the grievance process, stating that the contract gave it the right to take such unilateral action. App. 143a-145a. Time was too short, however, to complete the grievance and arbitration process before the Company's unilateral action was to take effect. USWA requested that the date of implementation of the Company's change be postponed so that there would be time for the grievance and arbitration process to be completed; in the alternative, USWA requested that the Company agree to immediate arbitration over USWA's right to bargain. The Company, having previously moved the effective date of the restructuring to June 7, refused both requests stating that bargaining and arbitration were both "too time consuming." App. 37a; see also App. 33a, n. 9.

On the morning of June 7, the date the change was to go into effect, about 100 of the employees of the plant met with their union representatives, who explained the situation and put this question to the employees: "Do you want to go back into the plant, or do you want to insist that the company sit down and negotiate or arbitrate." JA 82a. The employees chose to strike. They began picketing with signs bearing the legend, "Dow unfair to its union employees, members of Local 13744 on unfair labor strike." App. 136a.

On August 9, 1971, when the strike was just over two months old, the Company by letter to USWA purported to "cancel" the collective-bargaining agreement because of an alleged breach of the contract's no-strike clause: [4]

> This is to notify you that because of the breach of the Collective Bargaining Agreement between the Allyn's Point Plant of the Dow Chemical Company and the Union which had as its effective date 2/23/70, we hereby cancel the Agreement. [App. 139a].

Three days later, August 12, 1971, the Company wrote a letter to the striking employees, stating that August 17, 1971, would be "the last day that requests for reinstatement will be accepted." App. 140a. The eleven striking employees who quit the strike after receiving that letter were not terminated. JA 408a-415a. The ninety-five who remained on strike after August 17 were terminated. App. 140a.

On that same day, fifty-five employees then working at the plant signed a typed petition to the following effect: "[W]e *do not* want or need [USWA] at our plant. . . ." [5] App. 141a. On August 28, 1971, the Company wrote a letter to USWA stating that "because of the lack of majority status and contract termination . . .

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[4] That clause provides:

> The Union will not cause or engage in or authorize its members to engage in any strike against the Company, nor will any members of the Union take part in any other strike or stoppage or curtailment of work or restriction of production or interference with production of the Company, unless and until all of the Bargaining and Grievance Procedures outlined in this agreement have been exhausted. The Company will not cause or sanction any lockouts unless and until all of the Bargaining and Grievance Procedures as outlined in this Agreement have been exhausted. [App. 5a].

[5] For at least a year or two prior to the strike, the average employee complement at the plant had been approximately 140. JA 256a.

the Company no longer recognizes the Union as bargaining agent for our hourly-rated employees at the Allyn's Point plant." App. 141a.

B. Proceedings Below

1. *The Board's First Decision*

On a complaint issued by the General Counsel of the National Labor Relations Board (hereinafter "NLRB" or "the Board") alleging violations of §§ 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (hereinafter referred to as "the Act"), and after a hearing, the administrative law judge issued an opinion in which he found that the Company's initial unilateral action was an unfair labor practice [6] and that the strike was in response to that unfair labor practice. Nevertheless, the judge concluded that the strike was in breach of the contractual no-strike provision, because the Company's unfair labor practice that triggered the strike was not "serious." In so concluding, the judge applied the rule adopted by the Board in *Arlan's Department Stores of Michigan, Inc.*, 133 NLRB 802 (1961), which purports to limit the holding of this Court in *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270—that a general no-strike provision in a collective-bargaining contract does not waive the employees' statutory right to engage in an unfair labor practice strike—to situations where the employer's unfair labor practice is "serious."

Having found the strike to have been in breach of contract, the judge found that the Company's unilateral cancellation of the collective-bargaining agreement, the firing of the striking employees, and withdrawal of recognition of the union were permissible responses to the strike. With respect to the validity of the unilateral

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[6] While ruling that the Company's unilateral action was a violation of the Act, the judge expressly declined to rule that it was also a violation of the collective agreement. App. 145a-146a.

cancellation of the contract, the judge relied on the rule of *Marathon Elec. Mfg. Co.*, 106 NLRB 1171 (1953), *enforced sub nom., United Elec., Radio & Machine Workers v. NLRB*, 223 F.2d 338 (CA DC 1955), *cert. denied*, 350 U.S. 981, that, based on the doctrine of material breach from general contract law, a union's strike in breach of contract justifies an employer's unilateral cancellation of the entire agreement. Given these conclusions, the administrative law judge determined that the Company's conduct should go without a remedy and that the General Counsel's complaint should be dismissed. A three-member panel of the Board, by a vote of 2-1, affirmed the judge's decision and dismissed the complaint.

2. *The Court of Appeals' First Decision*

On USWA's petition for review, the Third Circuit reversed and remanded.

At the threshold, the court upheld the determination of the Board that the chain of occurrences at issue in this case began with the commission of an unfair labor practice by the Company:

> [W]e find substantial evidence in the record viewed as a whole to support the Board's conclusion that the management-rights clause did not justify the unilateral implementation of the shift changes. Accordingly, we agree with the Board that the company violated Sections 8(a)(5) and 8(a)(1). [App. 101a].

Having so found, the court made the following rulings. First, the court concluded that if exceptions be permitted to the rule of *Mastro Plastics*, they should not be such as to permit an employer, through leverage from its own initial wrong, to achieve ends destructive of the system of collective bargaining, while eschewing peaceful means of resolving the underlying dispute. See App. 110a, 114a-117a. Accordingly, without deciding whether the *Arlan's*

rule was a proper limitation on *Mastro Plastics*, or whether the Company's initial unfair labor practice was "serious," the court held,

> that, in evaluating the company's post-strike actions, the Board should have considered as a factor the company's failure to seek peaceful resolution through the grievance procedure and in the arbitral forum. [App. 115a]

Second, the court held that, assuming the strike to have been in breach of contract, the Board had erred in finding that "the union's strike in breach of the contract justified the companys' unilateral cancellation of the entire collective bargaining agreement." App. 117a-118a. The court expressly disapproved the doctrine of *Marathon Electric*: "we believe that the strict application of the doctrine of material breach derived from contract law is inconsistent with contemporary national labor policy." App. 118a. Thus, the matter was remanded to the Board.[7]

3. *The Board's Opinion On Remand*

Whereas the case had originally been decided by only a 3-member panel of the Board, on remand the case was considered by the full 5-member Board. By a vote of 3 to 2, the Board determined to retain the *Arlan's* distinction—*i.e.*, that strikes in response to "serious" employer unfair labor practices do not violate a general contractual no-strike commitment but strikes in response to "non-serious" unfair labor practices do constitute a breach of such a commitment.[8] But upon examination of the facts of this case, the full Board, by a 4 to 1 majority, reversed the decision of the administrative law

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[7] The Company's petition for a writ of certiorari from the Third Circuit's opinion was denied. *Dow Chemical Co. v. United Steelworkers of America, et al.*, 429 U.S. 834.

[8] The other two members advocated overruling *Arlan's* and treating all unfair labor strikes, whether "serious" or "non-serious", as within the doctrine of *Mastro Plastics*. App. 32a, n. 8.

judge and the 2-member panel majority and held that the Company's "unfair labor practices were *serious* within the meaning of *Arlan's*. . . ." App. 32a-33a. In so ruling, the Board did not declare any change in the legal standard applicable to such questions but simply applied the pre-existing standard to the facts at hand.

Under *Mastro Plastics* and *Arlan's*, that finding meant that the strike was not in breach of contract and was protected conduct from its inception. Accordingly, the Board held that the Company's unilateral cancellation of the contract, termination of the unfair labor practice strikers, and withdrawal of recognition from USWA were unfair labor practices.

As an alternative ground for its decision, the Board went on to assess "the parties relative willingness to arbitrate" (App. 35a), as the Third Circuit had directed it to:

> Judged on the basis of comparative responsibility in carrying out their contractual commitments, the onus for the strike must be placed upon the [Company]. It would not have occurred but for the [Company's] adamant insistence upon implementing the unilateral shift change before the grievance procedure could be completed and before arbitration could be set in motion, if agreed to. [App. 36a].

Having for these reasons ruled that the strike was not in breach of contract, the Board found it unnecessary to reach the question whether breach of the no-strike clause by USWA would have justified the Company's unilateral cancellation of the entire contract:

> [W]e note that the Court of Appeals for the Third Circuit has here expressed disapproval of the Board's *Marathon* rule as automatically giving an employer the right to terminate the contract for strike in breach of contract. *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (1953). As we have found the strike here to be protected, we do not address our-

selves to the *Marathon* rule at this time. [App. 36a, n. 13].[9]

4. *The Court of Appeals' Second Decision*

This time the Company petitioned the court of appeals for review of the Board's order.[10] A new panel of the Third Circuit, including two of the members of the first panel (but not the author of the first opinion, hereinafter "*Dow I*"), by a 2-1 vote (the dissenter, Judge Weis, having been a member of the first panel) set aside the Board's order. In so ruling, the court did not purport to disturb the Board's findings that the Company's initial unfair labor practice was "serious" or that "the onus for the strike must be placed upon the [Company]." Rather, the court based its decision on the following legal principles.

First, the court ruled that even if an employer's unfair labor practice is "serious," a union's agreement to a general no-strike provision in a contract waives the employees' right to strike in response to that unfair labor practice *if* the nature of the unfair labor practice is such that "its very existence depends upon competing interpretations of a contract, either one of which would be valid." App. 16a. In this case, the Company had claimed that it had a right under the management rights clause of the contract to engage in the unilateral action that set

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[9] Member Truesdale would have reached and decided this issue as follows:

> . . . I would modify the *Marathon Electric* rule to make it unlawful for an employer to rescind the collective-bargaining agreement where it has committed *any* unfair labor practice, however minor. This modification of *Marathon* is more equitable since the employer will not benefit from his wrongdoing. It also corrects the anachronism of *Marathon*, that pure contract principles are allowed to dominate important policies of the Act. [App. 84a-85a].

[10] The court had jurisdiction over the matter pursuant to §§ 10(e) and (f) of the Act.

off the strike. The Administrative Law Judge, the Board and the Third Circuit in *Dow I* ultimately found that contractual defense to have been without merit. Nevertheless, according to the court in *Dow II*, the mere fact that the Company could assert a contractual basis for its action is sufficient to render the strike over a "serious" unfair labor practice within the ambit of USWA's contractual no-strike commitment.

Second, the court ruled, in reversal of its holding in *Dow I*, that the breach of the no-strike commitment was a "material breach . . . warrant[ing] an employer's unilateral cancellation of the entire agreement. . . . [T]he *Marathon Electric* doctrine . . . continues to fill an important need in the law of labor contracts." App. 20a-21a.

REASONS FOR GRANTING THE WRIT

The decision below is inconsistent with the principles of national labor policy stated in this Court's decisions and is in direct conflict with decisions of other circuits.

1. Contrary to the rule of *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, the court below held that a strike called solely to protest an employer unfair labor practice, which the NLRB found to be a serious statutory violation, is prohibited by a typical contractual no-strike provision that does not expressly waive the right to strike over employer unfair labor practices. The instant case is in square conflict with a decision of the Tenth Circuit, which ruled on indistinguishable facts that such a strike is *not* prohibited by such a no-strike clause. *NLRB v. Northeast Oklahoma City Mfg. Co.*, 631 F.2d 669 (CA 10 1980).

2. Contrary to the general principles stated by this Court in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, and to the application of those principles in *Drake Bakeries Inc. v. American Bakery & Confectionary Workers*, 370 U.S. 254, and *United Packinghouse Workers v.*

Needham Packing Co., 376 U.S. 247, the court below held that a union's strike in breach of contract entitles an employer to respond by cancelling the entire contract. The decision below is in square conflict with the Fifth Circuit's decision in *NLRB v. State Electric Service, Inc.*, 477 F.2d 749 (CA 5 1973), in which that court properly followed the lessons of this Court's precedents.

Resolution of each of these issues is of general importance to the conduct of labor-management relations. The apparent inconsistency of the decision below with principles established by this Court and the conflict between that decision and the decisions of other circuits leave the applicable law in disarray. Uncertainty as to the scope of the typical no strike clause and as to the right of an employer or a union to walk away from a collective agreement upon a breach by the other party will unnecessarily complicate labor-management relations, both at the bargaining table and in the day-to-day give and take that characterizes those relations. In these circumstances, whether the court below was right or wrong, it is important that this Court grant certiorari and provide definitive answers to the questions posed.

I.

The question whether a strike in opposition to an employer unfair labor practice breaches a general no strike clause in a collective agreement was addressed by this Court in *Mastro Plastics Corp.* There, the union had agreed "to refrain from engaging in any strike or work stoppage during the term of this agreement." 350 U.S. at 271. During the term of the agreement, the employees struck solely to protest an unfair labor practice committed by the employer. The Court stated the issue posed as follows:

> Whether, in the collective-bargaining contract before us, the union's undertaking "to refrain from engaging in any strike or work stoppage during the term

> of this agreement" waives not only the employees' right to strike for economic benefits but also their right to strike solely against unfair labor practices of their employers . . . . [*Id.* at 271].

See also *id.* at 277. Again, later in the opinion, the Court set out in italics the question before it (*id.* at 279):

> *Does the collective-bargaining contract waive the employees' right to strike against the unfair labor practices committed by their employers?*

The answer that this Court gave to that question was similarly without qualification as to the nature of the unfair labor practice involved:

> [W]e conclude that the contract did not waive the employees' right to strike solely against the unfair labor practices of their employers. [*Id.* at 284].[11]

The decision of the court below thus cannot be reconciled with the express holding of *Mastro Plastics*. The court below sought to rationalize its departure from *Mastro Plastics* by maintaining that where the existence of an employer unfair labor practice depends in part on an interpretation of the collective agreement the union's waiver of its right to strike should be deemed to extend to a strike over the employer's *statutory* violation. That distinction has no source in the language or ra-

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[11] The analysis by which this Court reached that decision was premised on the difference in nature between strikes "to change existing economic relationships" (*id.* at 282) and strikes over unfair labor practices. See *id.* at 279-284.

As the instant case illustrates, the Board has sought to limit the *Mastro Plastics* rule of contract interpretation to those cases where the employer's unfair labor practice is "serious." Whether the Board's rule is consistent with the holding of *Mastro Plastics* is not directly raised by the instant case, because the employer here was found to have committed a "serious" unfair labor practice. However, if certiorari is granted, the rationale by which the question here is decided may have implications as to the validity of the Board's approach.

tionale of *Mastro Plastics*. And it is founded on the very confusion of contractual and statutory rights that this Court meant to put at rest in *NLRB v. C & C Plywood*, 385 U.S. 421, 428 ("[I]n this case the Board . . . has done no more than merely enforce a statutory right. . . . The Board's interpretation [of the contract] went only so far as was necessary to determine that the union did not agree to give up [the] statutory safeguards [stated in §§ 8(a)(5) and 8(a)(1)]. Thus, the Board, in necessarily construing a labor agreement to decide this unfair labor practice case, has not exceeded the jurisdiction laid out for it by Congress.").

In *Northeast Oklahoma City*, the Tenth Circuit confronted a strike over an employer unfair labor practice of precisely the same nature as that here and reached a result opposite to that of the court below. In that case, as here, the employer had unilaterally changed terms and conditions of employment in mid-term of a collective agreement, insisting, as did the Company in the instant case, that the agreement provided the right to do so. 631 F.2d at 675.[12] The Board had concluded, as it did here, that the contract did not give the employer the right to act unilaterally, "that the Company's mid-term changes violated Section 8(a)(5), and that this was a 'serious' unfair labor practice that justified a walkout despite the contract's general no-strike clause." 631 F.2d at 676. The Tenth Circuit enforced the Board's ruling, which was identical to that which the court below refused to enforce.

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[12] Indeed, the employer's first argument on appeal in *Northeast Oklahoma City* was that the Board should not have in the context of its unfair labor practice proceeding adjudicated the question whether the employer was authorized by the contract to act as it did, but rather should have deferred to the parties' arbitration machinery for the resolution of that contract question. 631 F.2d 673-675. The Tenth Circuit rejected that argument on the authority of *C & C Plywood Corp.*

II.

The court below expressly embraced the rule of *Marathon Electric* that an employer may cancel a collective agreement whenever a union strikes in breach of contract. In enforcing the Board's order in *Marathon Electric*, the District of Columbia Circuit explained the basis of the rule:

> It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. And that rule applies to labor contracts. . . . The walkout was a material breach which justified the subsequent rescission of the contract by the company. [223 F.2d at 341].

Two years after that decision, this Court first declared that the substantive law governing collective bargaining agreements is to be fashioned by the federal courts "from the policy of our national labor laws." *Lincoln Mills*, 353 U.S. at 456. This Court ruled that other sources of law may be looked to for analogies, but only insofar as "compatible with the purpose of" national labor policy. *Id.* at 457.

Applying the principles of *Lincoln Mills*, this Court has already dealt with closely-related variants of the problem presented by the instant case. In *Drake Bakeries* and *Needham Packing Co.*, this Court ruled that a union's strike in breach of contract does not justify an employers' repudiation of his contractual commitment to arbitrate. In reaching this conclusion, the Court in *Drake Bakeries* stated:

> In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would "promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace" (S. Rep. No. 105, 80th Cong., 1st Sess. 17). . . . Under our federal labor policy, therefore, we have every reason to preserve

> the stabilizing influence of the collective bargaining contract in a situation such as this. [370 U.S. at 263-264].

The lesson of *Drake Bakeries* and *Needham Packing* was drawn by the Fifth Circuit in *NLRB v. State Electric Service, Inc.*, which is in direct conflict with the decision below. In *State Electric Service, Inc.*, "[t]he issue . . . [was] whether or not the work stoppage by the employees was sufficient to justify State Electric's termination of the contract. . . ." 477 F.2d at 750. The court held that it was not:

> [W]e think it well settled that a union's breach of a no strike clause . . . is not automatically sufficient to [terminate] the entire contract. The Supreme Court has held that a union's breach of a no strike clause does not justify an employer's subsequent refusal to arbitrate, as required by the contract, the underlying dispute which gave rise to the stoppage in the first place. See *Packing House Workers v. Needham Packing Company*, 376 U.S. 247, 84 S.Ct. 773, 11 L.Ed.2d 680 (1964); *Drake Bakeries, Inc. v. Bakery & Confectionary Workers*, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962). If a breach of a no strike clause is not enough to relieve the employer of his duty to arbitrate the issue giving rise to the illegal work stoppage, it can certainly not automatically be held that a breach of a no strike clause terminates the entire contract with the union. [*Id.* at 751-752].[13]

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[13] In *State Electric*, the Board had found the strikers protected because their strike was not in breach of the contractual no-strike clause. The court of appeals equivocated as to whether the strike was in breach of contract, *id.* at 751, 752, but enforced the Board's order because "we see other reasons why the employer cannot prevail," *id.* at 751. One of the two "other reasons" was that quoted in text.

In addition to the Fifth Circuit's decision in *State Electric*, which is in direct conflict with the ruling of the court below, the

Reaching the same conclusion as the *State Electric* opinion, leading commentators uniformly have declared the rule of *Marathon Electric* to be inconsistent with national labor policy. See Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich.L.Rev. 1, 18-19 (1958); Summers, *Collective Agreements and the Law of Contracts*, 78 Yale L.J. 525, 542-544 (1969); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif.L.Rev. 663, 797-799 and n. 522 (1973). See also, the discussion of the issue by Chief Judge Seitz in his dissenting opinion in *Children's Rehabilitation Center, Inc. v. Service Employees International Union, Local No. 225*, 503 F.2d 1077, 1080 (CA 3 1974).

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following decisions, all of which follow and apply *Drake Bakeries* and *Needham Packing*, conflict in their reasoning with the decision below: *Trailways of New England, Inc. v. Amalgamated Association of Street, Electric Railway and Motor Coach Employees*, 343 F.2d 815, 817 (CA 2 1965), *cert. denied*, 382 U.S. 879; *Brotherhood of Locomotive Firemen & Enginemen, Lodge 844 v. Kennecott Copper Corp.*, 338 F.2d 224, 226 (CA 10 1964); *Minnesota Joint Board, Amalgamated Clothing Workers of America v. United Garment Manufacturing Co.*, 338 F.2d 195, 199-299 (CA 8 1964).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

Section 7, of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §§ 157, provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.

Sections 8(a)(1), 8(a)(3), and 8(a)(5) of that Act provide in pertinent part as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;
> >
> > * * * *
> >
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .
> >
> > * * * *
> >
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this title.

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), provides as follows:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.